(2)

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-1055

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM H. SHOCKEY,

Petitioner,

v.

CITY OF PORTLAND, a municipal corporation; JACK C. IRVIN, individually and in his official capacity; and JOHN LANG, individually and in his official capacity,

Respondents.

Petition For a Writ of Certiorari
To The Supreme Court of
The State of Oregon

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Jeffrey L. Rogers
City Attorney
(Counsel of Record)
Harry Auerbach
Deputy City Attorney
City Hall Room 315
1220 SW Fifth Avenue
Portland, Oregon 97204
(503) 823-4047

Attorneys for Respondents

BEST AVAILABLE COPY

31pp

QUESTIONS PRESENTED

1. Do the opinion of the Oregon Supreme Court and the opinion of the dissent below apply legal analyses that are fundamentally so different as to illustrate a conflict in the law requiring resolution by this Court? Conversely, do the opinions merely reflect a difference of judgment as to whether, in the context of the present case, the workplace petition, which petitioner claims caused his supervisors to try to fire him, addressed a matter of public concern?

2. Should the Court decline to review in this case the legal standard for "speech addressing a matter of public concern," where: petitioner's own testimony was that his workplace petition did not concern the public at all; petitioner further testified that he was not subject to any harassment or interference in circulating his workplace petition; and a jury has determined, on his

intertwined claim under state law, that plaintiff suffered no damages?

3. Does the Court have jurisdiction to review the decision of the Oregon Supreme Court, where the petition for writ of certiorari was not filed within ninety days of the order denying the petition for reconsideration below?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

RESPONDENTS' STATEMENT OF THE CASE . . 5

ARGUMENT 9

1. The Writ Should Be Denied Because Petitioner's Petition Was Not Timely Filed 9

2. The Writ Should Be Denied Because Review By this Court Will Not Substantially Affect the Outcome of the Litigation 17

3. The Writ Should Be Denied Because the Petition Raises No Issues Requiring Resolution By this Court . . 22

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases Cited

CIR v. Bedford, 325 US 283 (1944) . . . 15

Communist Party of Indiana v. Whitcomb, 414 US 441 (1974) 11

Connick v. Myers, 461 US 138 (1983) 22, 25, 26, 27, 28, 29

FTC v. Minneapolis-Honeywell Regulator Co., 344 US 206 (1952) 16

Missouri v. Jenkins, 495 US 33 (1990) . 11

Pickering v. Board of Education, 391 US 563 (1968) 25, 27, 28

Shockey v. City of Portland, 101 Or App 166, 785 P2d 776 (1990), aff'd in part, rev'd in part 313 Or 414, 837 P2d 505 (1992) 5, 7, 20, 25, 26

Federal Statutes and Rules

42 USC § 1983 . . . . . 6, 8, 19, 25

Fed R App P 41(a) 12

Supreme Court Rule 13.4 . 9, 10, 11, 12, 15

Supreme Court Rule 45.2 . . . . 12, 14, 15

Oregon Rules

ORAP 14.05 . . . . . 13, 15

ORAP 14.05(3)(b)(iii) 15

RESPONDENTS' STATEMENT OF THE CASE

This is an action, originally filed in state court, for money damages. Petitioner alleged that respondents, the City of Portland and two of its employees, wrongfully discharged him in retaliation for exercising his right to free speech, in the form of a petition he had circulated protesting the planned implementation of a workplace safety rule. The salient facts are stated in the Oregon Supreme Court's decision below, Shockey v. City of Portland, 313 Or 414, 416-17, 837 P2d 505 (1992):

> [Petitioner] was a wastewater mechanic for respondent City of Portland (city). [Respondents] Lang and Irvin were his supervisors. During 1984, the city considered implementing a policy requiring wastewater mechanics and other employees who could be exposed to chlorine gas to wear respirators. Pursuant to an administrative rule, the policy also included a provision that required bearded employees to shave any facial hair that would be located under the sealing surface of the respirator.

> [Petitioner], who has worn a beard for over 25 years, strongly opposed the policy. He circulated within his own city agency a petition * * *
>
> * * * * *
>
> In August 1984, the city implemented the policy. [Petitioner] refused to shave his beard and sought to be exempted from the policy by providing evaluation from a social worker that he "is a normally integrated man who has organically integrated his beard into his identity." Evidence also indicated that [petitioner] would develop "a most uncomfortable and distressing facial inflammatory skin eruption" if he shaved. The city refused to make an exception for [petitioner]. [Petitioner] did not shave off his beard. On June 19, 1985, the city discharged him.
>
> [Petitioner] sought review by the city's Civil Service Board. The board found that, in violation of the city's charter, the "discharge was not made in good faith for the purpose of improving the public service" and ordered that [petitioner] be reinstated with back pay.

Petitioner sued under 42 USC § 1983 and on common law theories of wrongful discharge and intentional interference with economic

relations. The trial court granted respondents' motion for a directed verdict as to the federal claim and as to the wrongful discharge claim. The intentional interference claim went to the jury against respondents Irvin and Lang only. The jury returned a verdict finding that those defendants had intentionally interfered with petitioner's economic relations with the City, but that petitioner had not been damaged. Judgment was entered dismissing the action.

Petitioner appealed to the Oregon Court of Appeals. The court of appeals reversed. Shockey v. City of Portland, 100 Or App 166, 785 P2d 776 (1990). The Oregon Supreme Court granted respondents' petition for review, and reversed in part and affirmed in part the decision of the court of appeals. Shockey v. City of Portland, 313 Or 414, 837 P2d 505 (1992). The Oregon Supreme Court held that, although there was some evidence

that petitioner's petition was the cause of respondents' attempt to discharge him, 313 Or at 423, "there truly is no matter raised by [petitioner]'s petition that is 'of public concern'. . ." Id. at 430. The Oregon Supreme Court therefore held that the trial court "did not err in dismissing [petitioner]'s claim under 42 USC § 1983." Id. at 431.

The Oregon Supreme Court affirmed the Oregon Court of Appeals' reversal of the dismissal of petitioner's state-law wrongful discharge claim. Id.

The Oregon Supreme Court's decision was filed on July 9, 1992. Respondents' petition for reconsideration of the state-law wrongful discharge claim was denied on August 25, 1992. Petition for Certiorari at 86a. The appellate judgment was entered on September 21, 1992. Petitioner filed his petition for certiorari in this Court on December 17, 1992.

ARGUMENT

1. The Writ Should Be Denied Because Petitioner's Petition Was Not Timely Filed.

Supreme Court Rule 13.4 provides (emphasis added):

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

Under Rule 13.4, the time for petitioner to file his petition for a writ of certiorari began to run, at the latest, on the date the Oregon Supreme Court denied respondents' petition for reconsideration, i.e., on August 25, 1992. Petitioner did not file his petition for certiorari in this

Court until more than ninety days after that date, and his petition was untimely.

Petitioner incorrectly measures the running of the time from the date of entry of the appellate judgment following the denial of respondents' petition for rehearing in the Oregon Supreme Court. Under Rule 13.4, "entry of a subsequent judgment" extends the time only if the lower court grants reconsideration. Since entry of judgment always follows the denial of rehearing, the language of Rule 13.4 measuring the time "from the date of the denial of the petition for rehearing" would be surplusage and a nullity if the time for filing a petition for certiorari were measured from entry of the appellate judgment following the denial of reconsideration.

Reading Supreme Court Rule 13.4 as a whole, it is clear that the time for filing a petition for a writ of certiorari in this

Court runs from the substantive disposition of the case below, i.e., the date of the lower court's decision on the merits or order denying reconsideration, and not from the formal entry of the appellate judgment. As this Court explained in Missouri v. Jenkins, 495 US 33, 45 (1990) (footnote omitted), Rule 13.4 embodies "the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." (Emphasis added.) See Communist Party of Indiana v. Whitcomb, 414 US 441, 445-46 (1974) ("Appellees' motions for reconsideration of October 3 suspended the finality of the judgment of September 28 until the District Court's denial of the motion [by order] on October 4 restored it.

Time for appeal thus began to run from October 4 . . ."). .

Moreover, Rule 13.4 explicitly provides that the time for filing a petition for certiorari is not measured "from the date of the issuance of the mandate (or its equivalent under local practice)." Entry of the appellate judgment in this case is the local equivalent of the issuance of mandate. Supreme Court Rule 45.2 describes this Court's mandate process:[1]

---

[1] See also Fed R App P 41(a):

> **Date of Issuance.** The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying

> In a case coming from a state court, the mandate shall issue 25 days after the entry of judgment, unless the time is shortened or enlarged by the Court or a justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of the petition. If the petition is then denied, the mandate shall issue forthwith.

The "equivalent under local practice" is found in Rule 14.05 of the Oregon Rules of Appellate Procedure:

> (3) The Administrator shall enter the original and send copies of the appellate judgment as soon as practicable after the court has filed its decision; provided that:
>
> * * * * *
>
> (b)(i) with respect to an order of the Supreme Court denying review or a decision of the Supreme Court, the Administrator shall not issue the appellate judgment for a period of 21 days after the order or decision to allow time for a petition for reconsideration under Rule 9.25
> * * *

---

the petition unless the time is shortened or enlarged by order.

* * * * *

> (iii) After entry of the court's order denying a petition for reconsideration, or, where more than one party petitions for reconsideration, after entry of the order or orders disposing of all such petitions, the Administrator shall forthwith enter and send copies of the appellate judgment, subject to the prerogative of the court to recall the appellate judgment as the interests of justice require.

In this Court, the issuance of the mandate follows the decision of the Court by a time sufficient to allow a party to file a petition for rehearing. In the Oregon Supreme Court, the entry of the appellate judgment follows the decision of the Court by a time sufficient to allow a party to file a petition for reconsideration. In this Court, the mandate is stayed pending the disposition of a petition for rehearing and "shall issue forthwith" if the petition is denied. Supreme Court Rule 45.2. In the Oregon Supreme Court, "the Administrator shall forthwith enter and send copies of the

appellate judgment," if the petition for reconsideration is denied. ORAP 14.05(3)(b)(iii). The entry of appellate judgment under ORAP 14.05 is thus the "equivalent under local practice" to the issuance of the mandate under Supreme Court Rule 45.2.

As this Court observed almost a half century ago, "In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek additional review. So long a period of time ought not to be extended by delay in entering a judgment . . ." CIR v. Bedford, 325 US 283, 288 (1944).[2] This is

---

[2]The promulgation of Supreme Court Rule 13.4, specifying that the time for filing a petition for a writ of certiorari does not run from the issuance of the mandate, obviates the specific concern expressed by the Court in CIR v. Bedford, 325 US 283 (1944), as well as its holding that the petition was timely because it was taken within three months of the "Order for Mandate" below.

particularly true where, as here, the petition for rehearing below was addressed only to petitioner's claims under state law and had no impact whatever on any matter which petitioner asks this Court to review. See FTC v. Minneapolis-Honeywell Regulator Co., 344 US 206, 213 (1952) (footnote omitted):

> Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle -- the principle that all litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review.

The petition for writ of certiorari was not timely filed, and the Court lacks jurisdiction to review the judgment below.

2. The Writ Should Be Denied Because Review By this Court Will Not Substantially Affect the Outcome of the Litigation.

The Court ought not review this case to re-examine the legal measure of when public employee speech addresses a matter of public concern because, by petitioner's own admission, his petition did not concern the public at all, and he was not subjected to any trouble, harassment or interference in circulating his petition in the workplace. Petitioner's testimony in the state trial court regarding the petition he circulated was:

> Q Turning to the petition that you circulated. You didn't circulate that petition to the public; did you?
>
> A No.
>
> Q In fact, it didn't concern the public at all; did it?
>
> A No.
>
> Q What steps prior to the petition did you take to make known your complaints, Mr. Shockey?

A We talked about it. Talked about it to our supervisors. Talked about it amongst ourselves.

Q Mr. Shockey, is it true that you had no problems in terms of circulating the petition?

A True.

Q Nobody stopped you?

A No.

Q Nobody harassed you?

A No.

Q Nobody interfered with your circulation at all?

A No.

Q In fact, you posted it right there on the company bulletin board; didn't you?

A I didn't. One of the other employees did.

Q The result of that petition: you sent it to [City Commissioner] Lindberg, and you had a meeting with Lindberg?

A I took it to Lindberg.

Q You took it to Lindberg?

A Yes.

Q Was the meeting satisfactory to you? What happened as a result of that meeting with Lindberg?

A No.

* * * * *

Q As it relates to the meeting, when you came out of the meeting did you feel that your complaints weren't heard, weren't listened to?

A No.

Q Did Commissioner Lindberg give you any idea that he was concerned about or had any problem with you circulating the petition or having a meeting such as this?

A No, he didn't.

Tr. 262-63.

Factually, the relation between the petition and the attempt to terminate petitioner was tenuous at best. The state trial court directed a verdict in favor of respondents on petitioner's civil rights claim under 42 USC § 1983 because there was no evidence from which a rational trier of fact could conclude that petitioner's

circulation of his petition in 1984 played any part in the decision to terminate him, some thirteen months later, in 1985. While the Oregon Supreme Court concluded that there was evidence from which a jury could infer causation, that court recognized that petitioner "had no proof to spare." Shockey v. City of Portland, 313 Or at 423.

The fact of the matter is that petitioner's civil rights claim is the tail wagging the dog in this litigation. Respondents Irvin and Lang tried to fire petitioner because he refused to comply with the policy which required him to shave. The City's Civil Service Board reinstated petitioner, with back pay and full restoration of seniority and benefits, because the Board found that Irvin and Lang should have considered petitioner's claim of psychological attachment to his beard before determining that he was not entitled to a medical exemption from the policy.

Petitioner never claimed before the Civil Service Board that there was any connection between the pre-policy petition he circulated and his termination for failing to comply with the policy after it was implemented.

This Court should not turn a blind eye to the practical realities of the cases it is asked to review. Here, the reality is that petitioner's first amendment claim was never anything more than an exercise in clever lawyering. No useful purpose would be served by continuing to litigate it.

Moreover, petitioner's state law claim for intentional interference with economic relations was submitted to the jury. The jury specifically found that petitioner suffered no damages. Petitioner presented no evidence that differentiated his purported damages by claim. Because this case already has been tried once, and a jury has determined that petitioner suffered no

damages in fact, there is no reasonable likelihood that a determination of the matters raised in the petition would be of any practical benefit to petitioner.

3. The Writ Should Be Denied Because the Petition Raises No Issues Requiring Resolution By this Court.

Petitioner argues that review is necessary because the opinion of the court and the opinion of the dissent below "together represent the two divergent and irreconcilable approaches to First Amendment analysis which have developed in the wake of Connick [v. Myers, 461 US 138 (1983)]." Petition at 11. However, a reading of the opinions below discloses that the difference is not in analysis, but in result.

In Connick v. Myers, Myers was employed as an assistant district attorney for 5-1/2 years. During this period she competently performed her responsibilities of trying criminal cases. Myers was informed she would be transferred to prosecute cases in a

different section which she strongly opposed. She expressed her opposition to several of her supervisors. Despite her objections, she was transferred. Myers then prepared a questionnaire soliciting the views of her fellow staff members on issues including office transfer policy, morale, the need for a grievance committee and the level of confidence in their supervisors. This Court held that Myers' speech was protected under the First Amendment only if it related to "matters of public concern" which must be determined by the content, form and context of the given statement. 461 US at 147-48.

In discussing whether Myers' speech was a matter of public concern, the Court stated:

> * * * We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers'

> dispute over her transfer to another section of the criminal court * * * We do not believe these questions are of public import. * * * While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect on employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.
>
> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 148-49 (emphasis added).

Consequently, the Court determined that Myers' questionnaire "touched upon matters of public concern in only a most limited

sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy." Id. at 153. Therefore, the Court concluded that Myers' discharge did not offend the First Amendment.

In this case, the decision of which petitioner seeks review relied principally upon this Court's opinion in Connick v. Myers.[3] Shockey v. City of Portland, 313 Or at 426-31. The court said, "Even speech that alludes to matters of public concern does not, by virtue of that fact alone, bring the speaker within the ambit of First Amendment protections sufficient to support a claim under 42 USC § 1983." Id. at 427. Quoting this Court, the court below reiterated, "'Whether an employee's speech

---

[3]The court also analyzed and applied this Court's decision in Pickering v. Board of Education, 391 US 563 (1968). Shockey v. City of Portland, 313 Or 414, 424-26, 837 P2d 505 (1992).

addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" Id., quoting Connick v. Myers, 461 US at 147 (emphasis in Shockey).

The dissent acknowledged, "In answering the question whether the employee's speech involves a matter of public concern, the court must examine for itself the statements in issue and the circumstances under which they are made to see whether they are of a character that the First Amendment protects." Shockey v. City of Portland, 313 Or at 436 (Unis, J., concurring in part, dissenting in part) (emphasis added). The dissent concluded that, "as determined by the content, form, and context of plaintiff's expression as revealed by the whole record, I conclude that, despite whatever self-interests motivated or triggered plaintiff to circulate the petition, all but the first two sentences of

plaintiff's petition concerns a matter of public concern." Id. at 446.

As the opinion of the court below explained,

> [W]e do not disagree with the dissent as to the appropriate analytical framework. The difference between our view and that of the dissent is simple: We do not find the wording of plaintiff's petition, in context, to require us to proceed beyond the first step of the Connick analysis. As to that first step, the parallels between this case and Connick are great and, where there are differences, the differences do not favor plaintiff.

Id. at 429-30 (emphasis in original). The court concluded:

> [T]here truly is no matter raised by plaintiff's petition that is of 'public concern' at least in the Pickering and Connick sense of that term. Plaintiff here was not challenging any act of his supervisors as illegal. He was not speaking to any matter that either had been or would be put to a public vote. And he was not protesting, even indirectly, office policy that was requiring other employees to give up or compromise one or another of their rights as citizens. In other

> words, this employee cared about his beard, period. To elevate that concern to a constitutional case merely because the employee mustered an argument related to public policy in pursuit of his personal goal would so trivialize the 'public concern' requirement of Pickering, Connick, and other cases, as to read the requirement virtually out of existence.

Id. at 430-31.

The test this Court has developed for balancing the free speech rights of public employees against the legitimate administrative concerns of public employers requires an individualized judgment, in any given case, as to whether an employee's speech addresses a matter of public concern. In making that judgment in this case, the Oregon Supreme Court viewed the content, form and context of petitioner's petition in light of the whole record and determined that the matters raised were more like those questions in the questionnaire in Connick which this Court determined were not matters of public concern. The dissent below viewed

the content, form and context of petitioner's petition and determined that the petition raised matters that were more like the one question in the questionnaire in Connick which this Court determined was a matter of public concern.

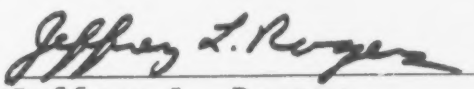
Because the determination of whether a given statement addresses a matter of public concern must be made on a case by case basis, it is impossible to achieve absolute uniformity in the decisions. The Court cannot review each employee speech case to determine whether it agrees with the result. Rather, it should reserve review for cases which can clarify or resolve conflict in the law to be applied. This is not such a case, and the petition should be denied.

CONCLUSION

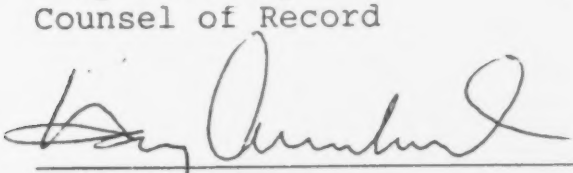
There is every reason to deny review, and none to grant it. The petition for writ of certiorari was not timely filed. The claim which .petitioner seeks to have

reviewed was, on its facts, marginal at best. Furthermore, a jury has already determined, on petitioner's state law claim arising out of the same transaction, that petitioner suffered no damages. Petitioner is highly unlikely to derive any benefit from this Court's review, even if the Court reversed the decision below. The Oregon Supreme Court applied the correct legal analysis, which differed from that of its dissenters only in the result reached. There is nothing for the Court to review, and the petition for writ of certiorari should be denied.

Respectfully submitted,



Jeffrey L. Rogers
City Attorney
Counsel of Record



Harry Auerbach
Deputy City Attorney
Attorney for Respondents